SUBJECT INDEX.

	Page
THE OPINION OF THE COURT BELOW	2
STATEMENT	2
SUMMARY OF ARGUMENT	6
ARGUMENT	
I. Respondents' Second Proposition (Brief p. 4) to the effect that the order refusing a new trial was reviewable, is not supported by the cases cited	7
II. The trial court's charge as to damages, of which complaint is now made, even if not strictly accurate in point of law, is not reviewable because the alleged error was not called to the attention of the trial court and no exception was taken until after the jury had left the bar	7
III. No question is raised by the exceptions to the court's refusal of respondents' requests to charge, or by the assignment of error based thereon (R. pp. 133-138), except the correctness of the request as a whole. It requires only inspection and no argument to demonstrate that nearly all of it should not have been given	9
CONCLUSION	10

ALPHABETICAL TABLE OF CASES CITED.

	Page
Bogk v. Gassert, (1893) 149 U. S. 17	10
Cub Fork Coal Company, et al. v. Fairmount Glass Works, 59 Fed. (2nd) 539	2
Insurance Company v. Folsom, 18 Wall. 237	7
Metropolitan Railroad Co. v. Moore, 121 U. S. 558	7
Pacific Express Co. v. Malin, (1889) 132 U. S. 531	9
Phelps v. Mayer, (1853) 15 Howard 160	8
Railroad Co. v. Fraloff, 100 U. S. 24	7
St. Louis & I. M. R. Co. v. Craft, 237 U. S. 648	7
The "Francis Wright," (1881) 105 U. S. 381	10
Wabash Railway Co. v. McDaniels, 107 U. S. 454	7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

FAIRMOUNT GLASS WORKS, *Petitioner*, v. CUB FORK COAL COMPANY AND PARAGON COLLIERY COMPANY, *Respondents.*	No. 314.

PETITIONER'S SUPPLEMENTAL BRIEF.

May It Please the Court:

Simultaneously with the granting of the petition for certiorari, this cause was assigned for argument at a date only four weeks thence. Without knowledge of what alleged errors might be urged by respondents in addition to the one considered by the Circuit Court of Appeals for the Seventh Circuit, it did not seem practicable to prepare an additional brief which would be of any real assistance to the court within the time

allowed by the rules. Petitioner did not receive copies of the "Brief for Respondents," to which this is a reply, until exactly one week before November 7, the day assigned. It was then impossible to prepare and serve this reply within one week of the day assigned.

The following brief is prepared solely with the idea that if the court sees fit to consider the alleged errors urged in respondents' latest brief, this brief may facilitate such consideration.

THE OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals for the Seventh Circuit has now been reported *sub nom. Cub Fork Coal Company, et al. v. Fairmount Glass Works*, 59 Fed. (2nd) 539.

STATEMENT.

The trial court's charge upon the question of damages, of which complaint is now made, was as follows:

> "In the event you find that the Defendant did break its contract with the Plaintiffs—in the event you find that the Defendant did enter into a contract with the Plaintiffs as the undisclosed principals of the W. E. Deegans Coal Company, and the Plaintiffs are entitled to recover, then it would be your duty to fix the amount of the damages. And the measure of damages in this case, in the event you find for the Plaintiffs, will be the value of the amount of coal which

the Defendant refused to take and which the Plaintiffs were ready, willing and able to deliver during the life of the contract, at the price fixed in the contract at the time of the breach, less the market price—that is, the difference between the contract price, as fixed by the contract, and the fair market price of that amount of coal which the defendant should have taken under its contract, and which it did not take.

"That is not stating it very clearly, but I hope I convey to you just what I mean. If you find that the Defendant broke its contract and did not take the coal that it should have taken from the Plaintiffs, at that time the Plaintiffs would be entitled to recover—if you find the Plaintiffs are entitled to recover—the difference between the value of that coal and the market price of such coal—its fair market value, and the contract price, plus six per cent interest."

(R. p. 121.)

Respondents' brief (p. 3) omits to state that the only attempt to except to this portion of the charge was made *after the retirement of the jury*, as follows:

"The Court: Swear the Bailiff.

"(The Bailiff was sworn.)

"The Court: Gentlemen, you may retire with the Bailiff.

"(Whereupon, the Jury retired to consider its verdict.)

"Mr. Hall: My attention has been called to this, your Honor—and that is the charge of the

Court as to the measure of damages would be the difference between the contract price and the market price at the time of the breach.

"Mr. Noel: Your Honor, an exception must be taken while the Jury is present, and the Jury has already retired. We object to this.

"The Court: Let it be shown that the Jury has retired in the custody of the Bailiff, and after the retirement of the Jury the attorney, Mr. Hall—

"Mr. Hall: But before they reached their room.

"The Court: Well, I don't know whether they have reached their room, or not.

"Mr. Hall: Well, let us state the time—within two minutes after the Jury left the jury-box. May I put that within two minutes after the Jury has retired?

"The Court: Yes.

"Mr. Hall: Counsel made this further exception and asked that the Jury be recalled and proper action taken, to-wit, that the Plaintiffs except to so much of the charge of the Court as states that the measure of damages is the difference between the contract price and the market price at the time of breach.

"The Court: Isn't that the rule?

"Mr. Hall: No, your Honor. It is the contention of counsel for Plaintiffs that the measure of damages is the difference between the contract price and the market price at the time specified in the contract for delivery. I don't believe the Court was right in that instruction which it gave.

"The Court: Supposing you didn't deliver the coal when you should have delivered it, but you tendered it six months later?

"Mr. Hall: Well, that is something else.

"The Court: Well, that is what you asked for—at the time of delivery.

"Mr. Hall: No, at the time called for in the contract for delivery.

"The Court: Well, the jury has retired. We will take a short recess."

(R. pp. 122-123.)

At the conclusion of the charge the court queried:

"Are there any exceptions or requests?"

To this counsel for respondents replied as follows:

"Mr. Hall: No exceptions, your Honor, but I suppose we get the benefit of the written requests which we passed up to the court."

Counsel then attempted to except to the court's supposed refusal to charge, in the following language:

"The Plaintiffs except to the refusal of the Court to grant the instructions in accordance with Plaintiffs' requests, numbered 1 to 11, both inclusive, and I suppose we will get the benefit of that exception separately, without going through them separately.

* * * * * *

"Mr. Hall: The Plaintiffs except to the refusal of the Court to charge as requested in requests numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11."

(R. p. 122.)

SUMMARY OF ARGUMENT.

I.

Respondents' second proposition (Brief p. 4), to the effect that the order refusing a new trial was reviewable, is not supported by the cases cited.

II.

The trial court's charge as to damages, of which complaint is now made, even if not strictly accurate in point of law, is not reviewable because the alleged error was not called to the attention of the trial court and no exception was taken until after the Jury had left the bar.

III.

No question is raised by the exceptions to the court's refusal of respondents' requests to charge, or by the assignment of error based thereon (R. pp. 133-138), except the correctness of the request as a whole. It requires only inspection and no argument to demonstrate that nearly all of it should not have been given.

ARGUMENT.

I.

Respondents' second proposition (Brief, p. 4) to the effect that the order refusing a new trial was reviewable, is not supported by the cases cited.

Extended discussion of these cases is unnecessary. Suffice it to say that *Wabash Railway Co. v. McDaniels*, 107 U. S. 454; *Insurance Company v. Folsom*, 18 Wall. 237; *St. Louis & I. M. R. Co. v. Craft*, 237 U. S. 648; *Metropolitan Railroad Co. v. Moore*, 121 U. S. 558, and *Railroad Co. v. Fraloff*, 100 U. S. 24, cited by respondents for this proposition, hold exactly the opposite and might all have been cited, as one of them was, in support of the petition for certiorari. The remaining cases from this court require no discussion, and the cases from Circuit Courts of Appeals have already been discussed in petitioner's original brief accompanying the petition for certiorari.

II.

The trial court's charge as to damages, of which complaint is now made, even if not strictly accurate in point of law, is not reviewable because the alleged error was not called to the attention of the trial court and no exception was taken until after the jury had left the bar.

The manner in which exception was sought to be taken to the court's charge as to damages is set out in our statement (*ante*, pp. 3-4).

Paragraph 1 of Rule 8 of the rules of this court provides:

> "No bill of exceptions shall be allowed on a general exception to the charge of the court to the jury in trials at common law. The party excepting shall be required before the jury retires to state distinctly the several matters of law in such charge to which he excepts; and no other exceptions to the charge shall be allowed by the court or inserted in a bill of exceptions."

The extreme antiquity of the above rule, dating from the statute of Westminster 2d, might fairly be said to make it an essential part of trial by jury. The origin of the practice and the reason behind it is stated in *Phelps v. Mayer*, (1853) 15 Howard, 160, as follows:

> "It has been repeatedly decided, by this court, that it must appear by the transcript, not only that the instructions were given or refused at the trial, but also that the party who complains of them excepted to them while the jury were at the bar. The statute of Westminster 2d, which provides for the proceeding by exception, requires, in explicit terms, that this should be done; and if it is not done, the charge of the court, or its refusal to charge if requested, form no part of the record, and cannot be carried before the appellate court by writ of error. It

need not be drawn out in form and signed before the jury retire; but it must be taken in open court, and must appear, by the certificate of the judge who authenticates it, to have been so taken.

"Nor is this a mere formal or technical provision. It was introduced and is adhered to for purposes of justice. For if it is brought to the attention of the court that one of the parties excepts to his opinion, he has an opportunity of reconsidering or explaining it more fully to the jury. And if the exception is to evidence, the opposite party might be able to remove it, by further testimony, if apprised of it in time."

It is also clearly expressed in *Pacific Express Co. v. Malin*, (1889) 132 U. S. 531.

In view of this rule, it is thought unnecessary to discuss the abstract correctness of the instruction. However, it may be pointed out that it was, at worst, merely obscure and is not definitely susceptible of the construction which counsel for the respondents place upon it.

III.

No question is raised by the exceptions to the court's refusal of respondents' requests to charge, or by the assignment of error based thereon (R., pp. 133-138), except the correctness of the request as a whole. It requires only inspection and no argument to demonstrate that nearly all of it should not have been given.

Reference is made to respondents' requested instructions and exceptions thereto merely because the argument on the facts found in respondents' latest brief, at pages 13 to 17, can have no purpose except as a basis for asserting some error of law committed by the court in charging the jury with respect thereto. The incorrect inference which respondents seek to draw from these facts has already been pointed out in our reply brief on certiorari on page 4. Moreover, the record shows no request for instruction upon any of this subject matter, except twelve instructions which were requested in gross, and to the refusal of which the only exception was an exception in gross. Consequently no ruling of law upon these facts was properly requested of the trial court, or properly excepted to.

The "Francis Wright," (1881) 105 U. S. 381;
Bogk v. Gassert, (1893) 149 U. S. 17.

CONCLUSION.

It is submitted that no question of law presented by this record was even fairly debatable. The present case has been three times tried. Two prior jury verdicts have been in petitioner's favor. Two prior actions on the same contract were dismissed before final judgment. (R. pp. 100-108.)

It is respectfully suggested that this apparently interminable litigation should end by an affirmance of the last judgment of the district court.

HENRY H. HORNBROOK,
PAUL Y. DAVIS,
Attorneys for Petitioner.

CHARLES REMSTER,
ALBERT P. SMITH,
KURT F. PANTZER,
ERNEST R. BALTZELL,
Of Counsel.